

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

05/15/2002

CLERK OF THE COURT  
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

LC 2000-001922

FILED: \_\_\_\_\_

STATE OF ARIZONA

GARY L SHUPE

v.

BRISA L MANIS

RICHARD A DYER

FINANCIAL SERVICES-CCC  
PHX CITY MUNICIPAL COURT  
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. 5854597

Charge: 1. DUI  
2. DUI W/AC OF .10 OR HIGHER  
3. EXTREME DUI

DOB: 08/23/71

DOC: 02/09/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

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This matter has been under advisement since the time of oral argument on April 15, 2002. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the Phoenix City Court, and the Memoranda and oral argument of counsel. This Court had previously ordered memoranda from the attorneys on the issue of a supplemental record.

IT IS ORDERED accepting only those matters which both parties have agreed to include within the record.

The first issue raised by Appellant is her allegation that the trial judge incorrectly denied her Motion to Suppress admissions made to Phoenix Police Officer Keith regarding her driving and drinking on the night of her arrest.

The decision made by the trial court involves a mixed question of law and fact.<sup>1</sup> Appellate courts must give deference to the trial judge's factual findings, including findings regarding or involving witnesses' credibility and the reasonableness of inferences drawn by witnesses.<sup>2</sup> This Court must review those factual findings for an abuse of discretion.<sup>3</sup> Only when a trial judge's factual finding, or inference drawn from that finding, is not justified or is clearly against reason and the evidence, will an abuse of discretion be established.<sup>4</sup> This Court must review *de Novo* the ultimate legal question whether Appellant's Fifth Amendment rights were violated.

In this case, the trial judge explained her reasons for denying Appellant's Motion to Suppress:

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<sup>1</sup> See, *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 927 P.2d 776 (1996); *State v. Magner*, 191 Ariz. 392, 956 P.2d 519 (App. 1998).

<sup>2</sup> *Id.*

<sup>3</sup> *State v. Rogers*, 186 Ariz. 508, 924 P.2d 1027 (1996).

<sup>4</sup> *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983); *State v. Magner*, *Supra.*

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It's the court's opinion that this was not, at the point the questions were asked, the custodial type of situation that's addressed by Miranda. The Defendant was being walked across a parking lot. She had not been told she was under arrest. She was not handcuffed. Her arm was held just to keep her from falling down.

So at the time the two - - just those two questions were asked, I'm finding that she was not in a custodial situation. Had it happened later on when she was seated in the police car and couldn't get out, that might have been a different situation, but I'm denying the Motion to Suppress for the reasons stated.<sup>5</sup>

Police officers are clearly required by Federal and Arizona State law to give the Miranda<sup>6</sup> warnings when a suspect is in custody and is interrogated while in custody.<sup>7</sup>

The testimony of Officer Keith was that Appellant was being walked to the patrol car so that she would have a place to sit down where she wouldn't harm herself, as she could not stand unassisted. Another reason was to find out what was going on.<sup>8</sup> The officers had not arrested Appellant at this time and did not intend to.<sup>9</sup>

Having determined a factual basis exists to support the trial judge's ruling, this Court also determines de novo that the facts do establish a reasonable basis for concluding that

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<sup>5</sup> R.T. of July 13, 2000, at pages 22-23.

<sup>6</sup> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

<sup>7</sup> Miranda v. Arizona, supra; State v. Landrum, 112 Ariz. 555, 544 P.2d 664 (1996).

<sup>8</sup> R.T. of July 13, 2000, at pages 8-12.

<sup>9</sup> Id.

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Appellant was not in custody and that her Miranda warning need not have been explained to her by the police at the time she answered a few brief questions. This Court, therefore, concludes that the trial judge correctly denied Appellant's Motion to Suppress.

Secondly, Appellant claims that the trial judge erred in denying her objection and Motion to Preclude witness' Bodillo and Gonzalez from testifying. Without citing any legal authority for the proposition that the witnesses should be precluded, Appellant contends that the trial judge erred in precluding them because they observed a video tape showing the Defendant prior to their testimony in court. The prosecutor avowed that the strength of the witnesses' identification testimony would not be based upon anything that they saw in the courtroom.<sup>10</sup> The trial judge attempted to suggest to Appellant's trial attorney that her objection to the witnesses was premature and suggested that counsel go back and talk to the witnesses.<sup>11</sup> It further appears from the record that Appellant did not request an opportunity to speak with the witnesses. Neither did Appellant request an evidentiary hearing, outside the presence of the jury, to determine the witnesses' ability to make an identification of Appellant independent from the video tape which they had seen played in court. Therefore, this Court concludes that Appellant has waived the issue for purposes of appeal.

Appellant also contends in several separately numbered issues that the trial judge erred in its rulings sustaining objections made by the prosecution and overruling objections made by Appellant's counsel. This Court finds no error with those evidentiary rulings by the trial judge.

Finally, Appellant also contends that the trial court erred in denying her Motion to Dismiss based upon an alleged comment by the prosecutor on the exercise of Appellant's right to remain

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<sup>10</sup> R.T. of July 13, 2000 at page 32.

<sup>11</sup> R.T. of July 13, 2000, at pages 32-34.

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silent. The record does not support Appellant's contentions that the prosecutor commented on her post-arrest right to remain silent. The trial judge denied Appellant's Motion to Dismiss finding:

Under the cases, the Court is aware of, this particular type of question is not considered to be a comment on the Defendant's right to remain silent. I would also note that Officer Campbell in his response refers to a five minute period that he talked to her (Appellant) before he placed her under arrest. I am denying the Motion to Dismiss...<sup>12</sup>

The trial judge's ruling denying Appellant's Motion to Dismiss appears to be supported by the record, and specifically by the testimony of Officer Campbell which referred specifically to the time that he spent with Appellant prior to her arrest. This Court finds no error in the trial court's ruling denying Appellant's Motion to Dismiss.

IT IS THEREFORE ORDERED affirming the judgments of guilt and sentences imposed by the Phoenix City Court in this case.

IT IS FUTHER ORDRED remanding this matter back to the Phoenix City Court for all further and future proceedings in this case.

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<sup>12</sup> R.T. of July 24, 2000, at page 194.  
Docket Code 513